United States Court of Appeals

for the Second Circuit

APPELLANT'S APPENDIX

74-2301

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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TOBY ZAMBRANO,

Plaintiff-Appellant,

v.

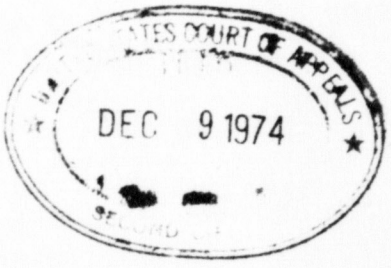
SOL MARKS, District Director
Immigration and Naturalization
Service, New York, New York,

Defendant-Appellee

----------X

Docket No.

74-2301



APPENDIX TO APPELLANT'S BRIEF

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December, 1974

PAGINATION AS IN ORIGINAL COPY

RELEVANT DOCKET ENTRIES

C O M P L A I N T

Plaintiff, by his attorney, ANTONIO C. MARTINEZ, complaining of his defendants, alleges for his complaint:

1- Plaintiff is a citizen of the United States residing within the Eastern District of New York.

Plaintiff was born in the Republic of Ecuador.

2- Defendant is District Director, Immigration and Naturalization Service, 20 West Broadway, New York, New York 10007.

3- (a) On or about May 18, 1973 the defendant denied, solely because of Plaintiff's national origin (Ecuador), plaintiff's petition to qualify plaintiff's brother, MAXIMINO ZAMBRANO-SEGUNDO as a preference immigrant. Exhibit 1.

(b) If plaintiff had been born in the Eastern Hemisphere Country, such petition would have been approved by the defendant.

4- Plaintiff has appealed to the Board of Immigration Appeals to review and reverse the May 18, 1973 decision of the defendant. On October 1, 1973 the Board dismissed such appeal. Exhibit 2.

5- Plaintiff has been invidiously discriminated against solely on the basis of his national origin, by defendant's application of Section 203(a) of the Immigration and Nationality Act of 1952, as amended.

The said Board of Immigration Appeals has asserted in its said decision that it lacks the power to pass upon validity of the statute administered by it.

6- (a) This is an action to declare unconstitutional Section 203(a) of the Immigration and Nationality Act of 1952, 8 U.S.C. Section 1153(a) in the circumstances under which it has been applied to plaintiff, as being violative of the Equal Protection of the Laws clause Fourteenth Amendment to the Constitution of the United States, and of the Due Process of Law Clause of the Fifth Amendment of the Constitution of the United States.

(b) Jurisdiction is predicated upon Section 279 of the Immigration and Nationality Act of 1952, as amended, 8 U.S.C. Section 1329.

WHEREFORE, plaintiff demands:

A- Judgment declaring Section 203(a) of the Immigration and Nationality Act of the 1952, as amended, 8 U.S.C. Sec. 1153(a) unconstitutional and void.

B- Judgment commanding defendant SOL MARKS to process plaintiff's petition to qualify his brother, MAXIMINO ZAMBRANO-SEGUNDO, as a preference immigrant without regard to the provisions of said Section 203(a), 8 U.S.C. Section 1153(a).

DECISION OF THE DISTRICT DIRECTOR DATED MAY 18, 1973

A20 098 393

The beneficiary was born in an independent country of the Western Hemisphere and is chargeable, for immigrant visa issuing purposes, only to the limitation of 120,000 on the number of immigrant visas which may be issued annually to aliens born in such countries. Such aliens are not eligible for any preference classification under Section 203(a) of the Immigration and Nationality Act, as amended.

The petitioner has the right to appeal this decision. However, in view of the beneficiary's clear ineligibility for preference classification under the law, it is strongly suggested that no purpose would be served by filing such an appeal and payment of the required fee therefor.

While not eligible for a preference immigrant visa, and while a considerable waiting period may be entailed before the beneficiary may be issued another type of immigrant visa, it is suggested that inquiry be made at a United States consular office, by or on behalf of the beneficiary, regarding the procedure for applying for such other immigrant visa.

EXHIBIT 1

DECISION OF THE BOARD OF IMMIGRATION APPEALS
DATED OCTOBER 1, 1973

APPLICATION: Petition to classify status of alien relative for issuance of immigrant visa

The United States citizen petitioner sought preference status for the beneficiary as his brother under section 203(a) of the Immigration and Nationality Act. The District Director denied the petition in a decision dated May 18, 1973. The petitioner appeals from that denial. The appeal will be dismissed.

The beneficiary was born in Ecuador, an independent country of the Western Hemisphere. The District Director was correct in holding that the preference classifications established under section 203(a) of the Immigration and Nationality Act are not available to a native of the Western Hemisphere, Matter of Donoso, Interim Decision 2198 (BIA 1973).

Petitioner's notice of appeal contains the contention that the District Director's decision was unconstitutional because it was "based upon an invidious discrimination" against the United States citizen petitioner, solely because of the petitioner's national origin. In Matter of Santana, 13 I&N Dec. 362 (BIA 1969) was rejected a similar argument. We also reiterated the position that we lack power to pass upon the validity of the statutes we administer.

EXHIBIT 2

We note that the petitioner claims discrimination against himself by virtue of his birth in Ecuador. This contention is without merit. Inasmuch as he is a naturalized United States citizen, the country of birth of the petitioner is irrelevant because all United States citizens stand on equal footing under the immigration laws.

We hold, then, that the District Director's denial of the petition was correct.

ORDER: The appeal is dismissed.

EXHIBIT 2

DEFENDANT'S NOTICE OF MOTION TO DISMISS

SIR:

PLEASE TAKE NOTICE that the defendant SOL MARKS, District Director, Immigration and Naturalization Service, New York, New York, by his undersigned attorney, will move this Court, HONORABLE WALTER BRUCHHAUSEN, presiding, on the 18th day of April, 1974, at Courtroom No.2, Second Floor, United States Courthouse, 225 Cadman Plaza East, Brooklyn, New York 11201 at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order, pursuant to Rule 12 of the Federal Rules of Civil Procedure, entering judgment on the pleadings and the certified administrative documents incorporated therein, in favor of defendant and dismissing the plaintiff's complaint, upon the grounds that the complaint fails to state a claim upon which relief can be granted.

PLAINTIFF'S NOTICE OF MOTION TO CONVENE
A THREE-JUDGE COURT

PLEASE TAKE NOTICE that plaintiff, by his undersigned attorney, will move this Court, the HONORABLE WALTER BRUCHHAUSEN, presiding, on the 23rd day of May, 1974 at Courtroom No.2, Second Floor, United States Courthouse, 225 Cadman Plaza East, Brooklyn, New York 11201 at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order, pursuant to 28 U.S.C. Sec. 2282 and 2284 convening a three-judge district court to hear and determine this action.

MEMORANDUM AND ORDER, DATED JULY 31, 1974
GRANTING DEFENDANT'S MOTION TO DISMISS
AND DENYING PLAINTIFF'S MOTION.

BRUCHHAUSEN, D. J.

This action was commenced pursuant to Section 279 of the Immigration and Nationality Act of 1952, 8 U.S.C. 1329. The complaint demands judgment declaring Section 203(a) of said Act, unconstitutional.

The plaintiff was born in Ecuador, and subsequently was granted citizenship in the United States. Thereafter, plaintiff attempted to secure preference status under said Act for his brother a native born in Ecuador, an independent country of the Western Hemisphere. The defendant denied this application, stating that such beneficiaries are not entitled to a preference under the Act. The Board of Immigration Appeals affirmed the decision of the District Director and dismissed the appeal of the plaintiff. The petitioner alleges that he has been invidiously discriminated against, solely on the basis of his national origin.

The defendant thereupon moved to dismiss the compalint upon the grounds that the complaint fails to state a claim upon which relief can be granted.

The plaintiff then moved for an order to convene a three-judge court pursuant to 28 U.S.C. 2282 and 2284.

It is clear that the plaintiff disagrees with the legislation that prohibits a foreign born, namely his brother, from entering this country as a preferred immigrant except under stated terms and conditions of the Act.

At the outset, the Court concludes that the plaintiff has not presented a substantial question for the convening of a three-judge court. The Court is not unmindful of its responsibility to carefully scrutinize a request to convene a three-judge court, in the interests of judicial economy. Bynum v. Connecticut Commission of Forfeited Rights, et al., 410 F2d. 173 (2d Cir. 1969) and cases cited therein.

In Kleindienst v. Mandel, 408 U.S. 753 the Court held in part at page 762:

> "It is clear that Mandel personally, as an unadmitted and nonresident alien, had no constitutional right of entry to this country as a nonimmigrant or otherwise. United States ex rel. Turner v. Williams, 194 U.S. 279, 292 (1904); United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950); Galvan v. Press, 347 U.S. 522, 530-532 (1954); see Harisiades v. Shaughnessy, 342 U.S. 580, 592 (1952)."

The question presented, therefore, is whether or not the section of the Act, 203(a), 8 U.S.C. 1153(a) is unconstitutional because the plaintiff has been denied equal protection of the laws since his brother was not granted a preferential status.

The beneficiary has been denied entry because he was born in a country located in the Western Hemisphere. The birthplace of the plaintiff had no bearing upon the denial of the preference status of the beneficiary. See Exhibits 1 and 2 attached to the complaint.

In Kleindienst v. Mandel, supra, the Court further held in part at pages 765-767:

"***In accord with ancient principles of the international law of nation-states, the Court in The Chinese Exclusion Case, 130 U.S. 581, 609 (1889), and in Fong Yue Ting v. United States, 149 U.S. 698 (1893), held broadly, as the Government describes it, Brief of Appellants 20, that the power to exclude aliens is 'inherent in sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers - a power to be exercised exclusively by the political branches of government ...' Since that time, the Court's general reaffirmations of this principle have been legion.[6] The Court without exception has sustained Congress''plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden.' Boutilier v. Immigration and Naturalization Service, 387 U.S. 118, 123 (1967). '(O)ver no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens. Oceanic Navigation Co. v. Stranahan, 214 U.S. 320, 339 (1909). In Lem Moon Sing v. United States, 158 U.S. 538, 547 (1895), the first Mr. Justice Harlan said:

> 'The power of Congress to exclude aliens altogether from the United States, or to prescribe the terms and conditions upon which they may come to this country, and to have its declared policy in that regard enforced exclusively through executive officers, without judicial intervention, is settled by our previous adjudications.'"

"Mr. Justice Frankfurter ably articulated this history in Galvan v. Press, 347 U.S. 522 (1954), a deportation case, and we can do no better. After suggesting, at page 530, that "much could be said for the view" that due process places some limitations on congressional power in this area "were we writing on a clean slate," he continue:

> "But the slate is not clean. As to the extent of the power of Congress under review, there is not merely 'a page of history', New York Trust Co. v. Eisner, 256 U.S. 345, 349, but a whole volume. Policies pertaining to the entrey of aliens

and their right to remain here are peculiarly concerned with the political conduct of government. In the enforcement of these policies, the Executive Branch of the Government must respect the procedural safeguards of due process.*** But that the formulation of these policies is entrusted exclusively to Congress has become as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government.**

"We are not prepared to deem ourselves wiser or more sensitive to human rights than our predecesors, expecially those who have been most zealous in protecting civil liberties under the Constitution, and must therefore under our constitutional system recognize congressional power in dealing with aliens..." Id., at 531-532.

In Kleindienst v. Mandel, supra, the Court stated, at page 767:

"We are not inclined in the present context to reconsider this line of cases."

See also Faustino v. Immigration and Naturalization Service, 302 F. Supp. 212; affirmed 432 F. 2d. 429 (Cir. 2) (1970).

The Court must conclude that the Act under attack is valid and constitutional. Therefore, the motion of the defendant to dismiss the complaint is granted and the motion of the plaintiff, to declare the said Section 203(a) unconstitutional, is denied.

It is so ordered.

Copies hereof are being forwarded to the respective attorneys.

NOTICE OF APPEAL

Notice is hereby given that plaintiff TOBY ZAMBRANO, appeals to the United States Court of Appeals for the Second Circuit from the Order of July 31, 1974 dismissing this action and denying plaintiff's motion to convene a three-judge District Court.

Date: New York, New York
September 17, 1974